Filed 4/24/19 In re D.J. CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re D.J., A Person Coming Under the Juvenile Court Law.	B292522
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. L.R. et al., Defendants and Appellants.	(Los Angeles County Super. Ct. No. CK38554)

APPEALS from an order of the Superior Court of Los Angeles County, Marguerite Downing, Judge. Conditionally reversed and remanded with directions.

Megan Turkat Schirn, under appointment by the Court of Appeal, for Defendant and Appellant L.R.

Terence M. Chucas, under appointment by the Court of Appeal, for Defendant and Appellant S.J.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Kim Nemoy, Principal Deputy County Counsel, for Plaintiff and Respondent.

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Mother L.R. and father S.J. appeal the juvenile court's order terminating their parental rights to their then nearly two-year-old son, D.J. Their only contentions on appeal are that there is a conflict in the record regarding whether father is an alleged or presumed father, and that the Los Angeles County Department of Children and Family Services (Department) and the juvenile court failed to investigate whether father has any Indian heritage under the Indian Child Welfare Act (ICWA; 25 U.S.C. § 1901 et seq.). Neither mother nor father contends or has made an offer of proof that father has Indian ancestry. Despite that, we conditionally reverse and remand with directions regarding ICWA compliance.

FACTUAL AND PROCEDURAL BACKGROUND

Given the narrow scope of this appeal, we limit our summary to those facts relevant to father's paternity status and ICWA.

D.J. (and mother's other children who are not at issue in this appeal) came to the attention of the Department in November 2016, after D.J. and mother tested positive for amphetamines and methamphetamines at D.J.'s birth. D.J. was immediately detained in foster care.

In a face-to-face interview with the Department, mother denied that D.J. had any Indian ancestry. The Department was unable to reach father. Accordingly, the Indian Child Inquiry Attachment to the dependency petition stated that D.J. "has no known Indian ancestry."

The detention hearing was held on November 30, 2016. Father did not appear at the hearing, and his whereabouts remained unknown. Mother completed a parentage questionnaire identifying him as D.J.'s father, and stating that he was present at D.J.'s birth and had signed D.J.'s birth certificate. The court signed the form order at the bottom of the parentage questionnaire, finding that father was D.J.'s presumed father, based on his execution of a

hospital declaration. However, the court's November 30, 2016 minute order and reporter's transcript of the hearing inconsistently reflect that father was only an "alleged" father.

Mother also completed a Parental Notification of Indian Status form, stating she has no Indian ancestry. When the court inquired, mother said she did not know if father had any Indian ancestry. The court found no reason to believe D.J. was an Indian child.

The jurisdictional/dispositional hearing was held on January 24, 2017. Father again failed to appear at the hearing. The court sustained the petition, removed D.J. from mother and father, and ordered reunification services for mother and father.

Over the course of the dependency, father submitted to only one interview with the Department, despite repeated efforts of the Department to contact him. He appeared at only one of the many court hearings, toward the end of the dependency. He never called to check on D.J., nor visited with D.J. Once, he attempted to accompany mother to a visit, at the beginning of the dependency, without prior Department approval, and he never sought Department approval after that. Father never participated in reunification services.

The Department's reports and reporter's transcripts of the court hearings do not reflect that father was asked about his Indian ancestry by the court or the Department. All the reports state ICWA "does not apply." The court did not order father to complete a Parental Notification of Indian Status form, and there is no indication in the record that the Department was asked to inform father that he was required to complete a Parental Notification of Indian Status form.

Over the duration of the case, mother made poor progress with her reunification services, and her visitation was sporadic and

of poor quality. D.J. remained placed with the same foster family, and was thriving in their care. His foster parents had an approved home study, and were committed to adopting him. At the September 7, 2018 permanency planning hearing, the court found D.J. to be adoptable, and terminated mother's and father's parental rights. Mother and father filed timely notices of appeal.

DISCUSSION

Congress enacted ICWA " 'to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.' " (*In re Isaiah W.* (2016) 1 Cal.5th 1, 8.) ICWA requires notice to Indian tribes "in any involuntary proceeding in state court to place a child in foster care or to terminate parental rights 'where the court knows or has reason to know that an Indian child is involved.' " (*In re Isaiah W.,* at p. 8.) The child's tribe must receive "notice of the pending proceedings and its right to intervene." (*In re H.B.* (2008) 161 Cal.App.4th 115, 120.)

"ICWA itself does not expressly impose any duty to inquire as to American Indian ancestry; nor do the controlling federal regulations. . . . But ICWA provides that states may provide 'a higher standard of protection to the rights of the parent . . . of an Indian child than the rights provided under [ICWA]' . . . , and long-standing federal guidelines provide 'the state court shall make inquiries to determine if the child involved is a member of an Indian tribe or if a parent of the child is a member of an Indian tribe and the child is eligible for membership in an Indian tribe.' " (*In re H.B.*, *supra*, 161 Cal.App.4th at pp. 120-121, fns. and citations omitted.)

Under state law, Welfare and Institutions Code former section 224.3[1] imposes on the juvenile court and the Department "an affirmative and continuing duty to inquire whether a child . . . is or may be an Indian child . . . ." (§ 224.2, subd. (a).) Similarly, the California Rules of Court impose on the court and Department "an affirmative and continuing duty to inquire whether a child is or may be an Indian child . . . ." (Cal. Rules of Court, rule 5.481(a).) The rules require the Department to "ask . . . the parents . . . whether the child is or may be an Indian child" and to "complete the Indian Child Inquiry Attachment . . . and attach it to the [dependency] petition. . . ." (Rule 5.481(a)(1), italics omitted.) Additionally, "[a]t the first appearance by a parent, . . . the court must order the parent . . . to complete [a] Parental Notification of Indian Status [form] . . . ." (Rule 5.481(a)(2), italics omitted.) If the parent does not appear at the first hearing, the court must order the Department "to use reasonable diligence to find and inform the parent . . . that the court has ordered the parent . . . to complete" the Parental Notification of Indian Status form. (Rule 5.481(a)(3).)

1. Standing

Initially, we must resolve father's parental status, as an alleged father lacks standing to challenge a violation of ICWA inquiry requirements. (See, e.g., *In re Daniel M.* (2003) 110 Cal.App.4th 703, 708.) The Department acknowledges that father was treated as a presumed father, as he was provided reunification services. (Welf. & Inst. Code, § 361.5, subd. (a) ["whenever a child is removed from a parent's or guardian's

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[1] The substantive provisions of Welfare and Institutions Code former section 224.3 have been renumbered as section 224.2, effective January 1, 2019, pursuant to Statutes 2018, chapter 833, section 7.

custody, the juvenile court shall order the social worker to provide child welfare services to the child and the child's mother and statutorily presumed father . . . ."].) Since the juvenile court treated father as a presumed father, we reach the merits of his claim of error on appeal.

The Department contends mother lacks standing to challenge the sufficiency of the ICWA inquiry. However, a parent without Indian heritage has standing to raise issues of ICWA compliance. (*In re B.R.* (2009) 176 Cal.App.4th 773, 779-780.)

2. Merits

The Department's attachment to the petition, and the statements in its reports, that ICWA did not apply were based only on mother's responses regarding D.J.'s Indian ancestry. When asked by the court, mother did not know whether father had any Indian ancestry. The Department only spoke with father once, and there is no indication he was ever asked about his ancestry. Moreover, the court never asked father about his ancestry, nor to complete a Parental Notification of Indian Status form, and did not order the Department to have father complete the form.

Neither mother nor father asserted in their opening briefs that father has any Indian ancestry. Instead of making an offer of proof in his reply brief, father contends the Department and court cannot delegate their duties of inquiry to father. Mother responds that she had no burden to investigate father's Indian heritage, as that information was wholly within father's knowledge.

Nothing prevented father, in his "briefing or otherwise, from removing any doubt or speculation" regarding D.J.'s possible connection to a tribe. (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1431.) Even after the Department pointed out in its respondent's brief that father failed to make an offer of proof of Indian heritage, *he declined to do so*, coyly arguing "it would have

been very easy for the social worker and the juvenile court to do their duty and inquire of [father] whether he had Indian ancestry." Easier still, at this stage of the case and of D.J.'s life, is for father to disclose what his answer to any inquiry might be, if he seriously believed D.J. has Indian heritage.

However, recent authority persuades us to reverse and remand for ICWA compliance. It has been held that a parent may raise ICWA compliance issues on appeal even though the parent did not object to ICWA compliance deficiencies in the juvenile court; and that in an appeal raising ICWA compliance issues, the parent is in effect acting as a surrogate for the tribe, to achieve the purpose of providing notice sufficient to allow the tribe to determine whether the child is an Indian child, and whether the tribe wishes to intervene in the proceedings. (*In re N.G.* (2018) 27 Cal.App.5th 474, 484.)

It appears in this case that the Department and the trial court forgot to ask father when he made his only appearance in this case whether he has any American Indian ancestry. That was error, because the Department and the trial court have a continuing duty of inquiry. The Department must inform father that he is required to complete a Parental Notification of Indian Status form, and the court must order father to complete the Parental Notification of Indian Status form, even though there is no reason to know that D.J. is an Indian child. Although father has never sought to reunify with D.J. and has shown no concern for his child, mother and father in this appeal are surrogates for any tribe in which D.J. may have Indian heritage. For that reason, and in order to lay to rest the ICWA compliance issue, we conditionally reverse and remand with instructions.

DISPOSITION

The order terminating parental rights to D.J. is conditionally reversed. The matter is remanded to the juvenile court with directions to comply with the inquiry provisions of Welfare and Institutions Code section 224.2 and California Rules of Court, rule 5.481, and if as a result of that inquiry there is reason to know D.J. is an Indian child, with the notice provisions of ICWA, section 224.3, and rule 5.481. Moreover, because father raised ICWA compliance for the first time on appeal, refusing to state whether he claims Indian heritage, and mother claims no knowledge of father's ancestry, we hereby order father to supply the Department with any relevant facts about his possible Indian ancestry upon request. If the inquiry reveals no reason to believe D.J. is an Indian child, or father does not respond to the Department's diligent efforts to obtain such information, then the order terminating parental rights will be reinstated. If it is determined notice is required, the court must proceed accordingly.

GRIMES, Acting P. J.

WE CONCUR:

STRATTON, J.

WILEY, J.